ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CACR 06-582

MARCH 7, 2007

RICHARD EDWARD MERRITT APPELLANT	APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT [NO. CR-05-126, CR-05-127]
V.	HONORABLE RALPH EDWIN WILSON, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Richard Edward Merritt was charged with three counts of rape, three counts of residential burglary, and two counts of felony theft. After a jury trial, he was convicted of three counts of rape and three counts of residential burglary, and was sentenced as a habitual offender to a total of 570 years in prison. On appeal, Mr. Merritt argues that there was insufficient evidence to support his convictions. He also argues that the trial court erred in not severing the charges relating to each victim from the charges related to the other victims. We affirm.

When an appellant challenges the sufficiency of the evidence on appeal, we address that argument prior to any other alleged trial errors. *Williams v. State,* 338 Ark. 97, 991 S.W.2d 565 (1999). The test is whether there was substantial evidence to support the

verdict. *Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003). Substantial evidence is evidence that is forceful enough to compel a conclusion beyond suspicion or conjecture. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). In making our review, we view the evidence in the light most favorable to the State, considering only that evidence that supports the conviction. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). We defer to the jury's determination on the matter of witness credibility. *Jones v. State*, 52 Ark. App. 179, 916 S.W.2d 766 (1996).

At appellant's trial, the State presented proof that three elderly women had been burglarized and raped in their respective homes in Earle, Arkansas. The crimes were committed against M.W., then 93 years old, on November 18, 2003; D.H., then 71, on March 30, 2004; and I.N., then 87, on December 23, 2004. On each occasion, the perpetrator gained entry through a window. I.N. was deceased at the time of the trial, but both M.W. and D.H. gave testimony for the State.

M.W. testified that she was home alone and was upstairs watching television in her bedroom at about 10:00 p.m. on the night of November 18, 2003, when she looked up and saw two black men standing near her bed. She stated that one of the men put a pillow over her head, and she was unable to identify the suspects. According to M.W., the man who put the pillow over her head asked where her money was, and she told him where it was downstairs. M.W. was ordered to lie in the upstairs hallway, where her assailant tied her hands behind her back, put his coat over her head, and raped her. After the two men left her

house, M.W. drove to her son's house, and her son called the police and an ambulance. M.W. stated that during the incident money and two pistols were stolen, and that her cell phone was also missing.

D.H. testified that she was at home by herself on the night of March 30, 2004, watching television in her bedroom. D.H. heard some noises, and upon investigating another bedroom found that clothes had been taken from the drawers and thrown on the floor. D.H. knew something was wrong and attempted to flee her house, but was caught from behind by her assailant. D.H. could tell that he was a black man, but stated that it was too dark to identify him. According to D.H., the man asked where her money was, dragged her to her bedroom, and tied her hands together. He then put a scarf around her face and raped her. During the attack, the culprit stated that he likes "old mf's." The man took some money from D.H.'s pocketbook and left in her car.

Officer Terry Phillips of the Earle Police Department testified about the episode that occurred on the night of December 23, 2004. He stated that he was dispatched to the home of I.N. at 9:00 p.m. Upon making contact with I.N. at her house, she advised him that she had been raped, and an ambulance was called. Officer Phillips testified that I.N. said that the rape was perpetrated in her bedroom by a black man with a mask over his face. Officer R.W. Brockwell also investigated the incident, and I.N. told him that the man asked where her money was and tied her hands together before raping her. He also started to gag her but

stopped because she had respiratory problems and could not breathe. The man left I.N.'s house with her money and her car.

There were various law enforcement personnel who collected items from each house that were transported to the Arkansas State Crime Lab for testing. In addition, hospital personnel performed rape kits on the victims and that evidence was turned over to the crime lab. Terry Rolfe, chief forensic biologist for the crime lab, conducted the testing.

Ms. Rolfe stated that she has testified as an expert on DNA testing numerous times. In the present case, Ms. Rolfe conducted DNA tests on the samples provided and compared them to a large database of DNA profiles, which included that of Mr. Merritt because of his prior felony convictions. Ms. Rolfe testified that a hair recovered from the upstairs hallway of M.W.'s home matched appellant's DNA. She further stated that vaginal swabs taken from D.H. matched appellant's DNA. Semen recovered from a mattress cover that had been in I.N.'s bedroom also matched appellant's DNA.

Subsequent to these findings, Mr. Merritt was arrested and additional DNA samples were obtained from his person and transported to the crime lab. According to Ms. Rolfe, she repeated the DNA testing using the recent samples taken from Mr. Merritt, and these tests confirmed the accuracy of the previous tests. Ms. Rolfe testified that, with respect to the hair, the vaginal swab, and the mattress cover, the probability of the DNA coming from someone in the black population other than Mr. Merritt is one in 74 quadrillion. Ms. Rolfe also stated that she detected a partial DNA profile from M.W.'s pajamas, which made it nine

hundred times more likely that the sample came from Mr. Merritt versus any other random individual in the black population.

The State also put on proof from witnesses regarding use of the cell phone that was missing from M.W.'s house. This testimony, along with telephone records, established that about a month after the attack on M.W., Mr. Merritt was in possession of M.W.'s phone, from which calls had been made.

Mr. Merritt put on defense witnesses that purported to give alibis as to his whereabouts during each of the criminal episodes. In this regard, Teresa Holloway testified that she worked with Mr. Merritt and dropped him off after work at a house in West Memphis between 9:00 p.m. and 9:30 p.m. on March 30, 2004. Appellant's sister, Demekia Merritt, testified that she was at that house and that appellant stayed there until midnight. Appellant's other sister, Samantha Brown, maintained that Mr. Merritt was working on her floors on the night of November 18, 2003, and did not finish working until the following morning. Mr. Merritt's mother testified that he was at her house sleeping and then playing video games on the night of December 23, 2004. Mr. Merritt testified in his own defense, and he denied committing any of the crimes with which he was charged.

Mr. Merritt's first argument on appeal is that there is no substantial evidence to support his convictions. He asserts that there were no witnesses to identify him as the perpetrator of any of the crimes, and submits that DNA evidence, standing alone, cannot support a conviction. Mr. Merritt cites *Gamble v. State*, 351 Ark. 541, 95 S.W.3d 755

(2003), where our supreme court defined "direct evidence" as evidence that proves a fact without resort to inference, when for example, it is proved by witnesses who testify to what they saw, heard, or experienced. Mr. Merritt contends that DNA results are not direct evidence, but rather circumstantial evidence, and thus to constitute substantial evidence they must exclude every other reasonable hypothesis than that of the guilt of the accused. *See Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000). Mr. Merritt argues that DNA testing fails to meet this standard.

While acknowledging that this court typically looks only to the evidence supporting the conviction, Mr. Merritt urges us to consider the substantial amount of testimony that places him in areas other than where the rapes were committed. Mr. Merritt asserts that this testimony was stronger than the State's evidence, which failed to place him at the scenes of the crimes through eyewitnesses, fingerprints, confessions, or other evidence independent of the DNA results.

We hold that there was substantial evidence to support each of Mr. Merritt's convictions.[1] Our supreme court has consistently accepted DNA evidence as proof of guilt. *Engram v. State*, 341 Ark. 196, 341 S.W.3d 196 (2000). Furthermore, DNA evidence is substantial standing alone. *See Ellis v. State*, 364 Ark. 538, _ S.W.3d _ (2006)(holding that

[1]While the State asserts that appellant's challenge to the sufficiency of the evidence is not preserved because he failed to make a specific directed verdict motion as required by Ark. R. Crim. P. 33.1(a), we think that his motion below sufficiently apprised the trial court of the argument now being raised on appeal, and thus we reach the merits of the argument.

DNA evidence identifying appellant as the contributor of sperm found in victim's person and underwear is alone sufficient evidence identifying appellant as the attacker); *see also Engram v. State*, *supra*. Therefore, even without eyewitness testimony or other corroborating evidence, the DNA results in this case sufficiently supported the jury's conclusion that Mr. Merritt was the person who committed the burglaries and rapes. In reaching this decision, we decline appellant's invitation to consider the alibi testimony of the defense witnesses, as we are constrained on appeal to consider only that evidence that supports the verdict. *See Stone v. State*, *supra*.

Mr. Merritt's remaining argument is that the trial court erred in not severing the charges relating to each victim from the charges relating to the other victims. Prior to trial, the State filed a motion to join the charges, and in his response the appellant requested that the State's motion be denied. At a pretrial hearing, the trial court addressed the motion and announced from the bench:

> [T]he issue here is whether these three separate crimes are part of a single scheme or plan, or are a series of acts connected together. This is discretionary with the court. In this case you do have similarities and common factors. First, the location, all occurring in or near Earle. The victims were all apparently elderly and lived alone, elderly being seventy-two, eighty-four and ninety-three. The attacks were all apparently at night, one at 9:30 p.m., one at 10:30 p.m. and the other at 11:30 p.m. The court is also looking at the modus operandi. The state alleges in all three cases it was forcible sexual intercourse, they all occurred within the homes of these three elderly women so there was a home invasion and there was restraint used in all three. As (the prosecutor) points out there would be a significant or substantial overlap of witnesses. As far as judicial economy is concerned, obviously, one trial would be what the court ought to decide. The court also needs to look at whether or not one trial would be unduly prejudicial to the defendant in this case. I think all the crimes would come in on any trial, through Rule 404(b) involving the issues of motive,

> opportunity, intent or plan. These are the same factors to use in deciding if the cases should be joined. If we had three trials there would be three separate sentences and they would be stacked. In considering all these factors, including the defendant's right to a fair trial, the court is going to grant the motion for joinder for the reasons and grounds the court cited in this oral opinion.

While the State argues in its brief that the specific issue now being brought on appeal was not preserved because it was not properly raised to the trial court, from the context of the trial court's ruling it is evident that appellant made the trial court aware of his specific objection and obtained a ruling. The State also argues that this argument has been waived because there was a lack of compliance with Ark. R. Crim. P. 22.1(b), which provides, "If a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Severance is waived by failure to renew the motion." We disagree because the appellant's pretrial motion objecting to joinder was effectively a motion for severance, and it is undisputed that Mr. Merritt renewed the motion at the beginning of the trial, and therefore there was compliance with Rule 22.1(b).

Mr. Merritt contends that the trial court's refusal to sever the offenses and afford him separate trials was in violation of Ark. R. Crim. P. 22.2(a), which provides, "Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses." Mr. Merritt asserts that while the offenses against the three victims were of similar character, they were not part of a single scheme or plan.

In making his argument, appellant relies on *Clay v. State*, 318 Ark. 550, 886 S.W.2d 608 (1994). In that case, Mr. Clay was charged with committing five sex offenses against five different victims at different locations over a one-year period, and there was no allegation or proof that the five offenses were planned in advance as a part of a single scheme. Mr. Clay was seventeen years old when most of the crimes were committed, and the victims were three to five years younger than he. The trial court ordered all five charges consolidated for trial and refused Mr. Clay's motion to sever. The supreme court reversed that ruling, and wrote:

> The Commentary to Section 2.2(a) of the ABA Standards relating to Joinder and Severance, Approved Draft, provides:
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> > The joinder together for one trial of two or more offenses of the same or similar character when the offenses are not part of a single scheme or plan has been subjected to severe criticism over the years. Generally, the test for whether joinder is proper involves weighing of the possible prejudice to the defendant from joinder against the public interest in avoiding duplicitous, time-consuming trials in which the same factual and legal issues must be litigated. *See United States v. Haim*, 218 F. Supp. 922 (S.D.N.Y 1963); *United States v. Teemer*, 214 F. Supp. 952 (N.D.W.Va. 1963). On this score, joinder of offenses not part of a single scheme or plan is difficult to justify. "[S]ince the offenses on trial are distinct, trial of each is likely to require its own evidence and witnesses. The time spent where similar offenses are joined may not be as long as two trials, but the time saved by impaneling only one jury and by setting the defendant's background only once seems minimal." Note, 74 Yale L.J. 553, 560 (1965). Against this small gain from joinder, it has been observed: "We all know that, if you can pile up a number of charges against a man, it is quite often the case that the jury will convict, where, if they were listening to the evidence on one charge only, they would find it wholly insufficient as to the degree of proof required." Maguire, *Proposed New Federal Rules of Criminal Procedure*, 23 Ore. L. Rev. 56, 58-59 (1943).

> The same commentary also provides that two of the most compelling reasons for granting a severance of offenses *without a specific showing of prejudice* are:
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> (1) Undue limitations on the defendant's right to testify in his own behalf. Prejudice may develop when an accused wishes to testify on one or some, but not all, of joined offenses that are distinct in time, place, and evidence. If he testifies on one count, he runs the risk that any adverse effect will influence the jury's consideration of the other counts. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced in testifying on the count upon which he wished to remain silent. *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964),
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> (2) Prejudice through introduction of evidence which fails to meet the other crimes test. If an accused is prosecuted on each charge separately, the evidence of the other crimes will not be admissible under the other crimes rule, Rule 404(b). Thus, by joining unrelated offenses together for trial, a prosecutor might bring about the evil to be avoided by the general rule that the evidence of other crimes is not admissible: "The likelihood that juries will make . . . an improper inference." See Note, 74 Yale L.J. 553, 556-57 (1965); and *Drew v. United Stated*, 331 F.2d 85, 90 (D.C. Cir. 1964).

Id. at 555-56, 886 S.W.2d at 611-12. The supreme court rejected the State's argument that the trial court's ruling should be upheld based on the exception that the accused had a "depraved sexual instinct," stating:

> The unconnected crimes charged in this case do not involve the same child or other children in the same household, and they do not show that type of "depraved sexual instinct" evidenced by a sixty-year old man who commits a sexual offense against a seven-year-old boy or girl. Here, a seventeen- or eighteen-year-old man was accused of committing five unconnected sexual assaults against five different girls from three to five years younger than he.

Id. at 558, 886 S.W.2d at 613. In resolving the issue in favor of Mr. Clay, the supreme court concluded:

> In summary, the alleged offenses occurred over a twelve-month period, involve different charges, and were committed in different manners, against different victims, at different locations. They did not involve "similar acts with the same child or other children in the same household . . . showing 'a proclivity toward a specific act with a person or class of persons.'" [*Free v. State*, 293 Ark. 65, 71, 732 S.W.2d 452, 455 (1987)]. There was no allegation or proof that the five offenses were planned in advance as part of a single scheme. There was no allegation or proof these crimes were part of one criminal episode. Since these five crimes were of a similar character, but were not part of a single scheme or plan, the appellant had "a *right* to a severance of the offenses." Ark. R. Crim. Rule 22.2(a) (emphasis added). In addition, the culpable mental state required to be proved [forcible compulsion as opposed to statutory rape] was different for some of the crimes. Both the severance rule and our cases mandate reversal and remand for new trials.

Id. at 559, 886 S.W.2d at 613.

In the case at bar, Mr. Merritt asserts that we should reach the same result as that reached in *Clay v. State*, *supra*, in view of the clear similarity of the facts. Mr. Merritt argues that there was no proof that the alleged crimes were part of one criminal episode, asserting that 16 ½ months had elapsed between the first and last rape.[2] He further notes that the alleged crimes were committed against different victims at different locations. Under these circumstances, Mr. Merritt argues that he had an absolute right to severance of the offenses.

The trial court has discretion to grant or deny a severance, and we will not disturb that ruling absent an abuse of discretion. *Parish v. State*, 357 Ark. 260, 163 S.W.3d 843 (2004).

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[2]The record shows that the time gap between the first and last rape was actually about 13 months.

Under the circumstances of the instant case, we hold that the trial court did not abuse its discretion in refusing to sever the charges.

In *Clay v. State*, *supra*, our supreme court emphasized the "single scheme or plan" language of Rule 22.2 instead of focusing on relevancy under Ark. R. Evid. 404(b), which provides:

> *Other Crimes, Wrongs, or Acts*. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In its more recent opinion in *Parish v. State*, *supra*, the supreme court held that where evidence of another rape would be independently admissible under Rule 404(b), and thus each victim's testimony would be admissible in the trial of the other to show the defendant's intent, motive, or common scheme or plan, the trial court committed no abuse of discretion in refusing to sever the charges. Such was the case here.

The supreme court has upheld the admission of evidence under 404(b) in situations where the prior bad acts of the defendant bore substantial similarities to the case in which the evidence was introduced. *See Morris v. State*, __ Ark. __, __ S.W.3d __ (Oct. 5, 2006); *Fells v. State*, 362 Ark. 77, 207 S.W.3d 498 (2005); *Burmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000). In the present case there were substantial similarities in the burglaries and rapes in that: (1) they occurred in the evening and were perpetrated against elderly women who were home alone; (2) the victims' homes were in close proximity to one

another; (3) the assailant invaded each home through a window and asked for money prior to committing each rape; (4) the culprit had the common scheme of tying the victims' hands and gagging them; and (5) during one of the rapes the culprit indicated to the victim that he likes "old (women)."

In *Clay v. State*, *supra*, relied on by appellant, the supreme court indicated that a factor to consider was whether the conduct showed a proclivity toward a specific act with a certain class of persons. In the present case, each criminal episode evidenced the assailant's proclivity to force sex upon elderly women. This factor, along with the other evidence presented by the State in this case, adequately demonstrated a common scheme or plan in relation to each individual episode. For these reasons, the trial court did not err in refusing to sever the charges.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.